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WRITER'S DIRECT DIAL

August 16, 2012

FILED/ACCEPTED

AUG 16 2012

Federal Communications Commission  
Office of the Secretary

Via Hand Delivery

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20544

Re: MPS Media of Gainesville Licensee, LLP,  
Licensee of Station WNBW-DT, Gainesville, Florida,  
For Waiver of §§ 76.92(f) and 76.106(a)  
File No. CSR-8692-N - MB Docket No. 12-214

Dear Ms. Dortch:

Enclosed please find, on behalf of Orlando Hearst Television Inc., licensee of WESH(TV), Daytona Beach, Florida, the original and four copies of an Opposition for filing in the above-referenced matter.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Sincerely,



Elizabeth E. Spainhour

Enclosures

Before the  
Federal Communications Commission  
Washington, D.C. 20544

FILED/ACCEPTED  
AUG 16 2012  
Federal Communications Commission  
Office of the Secretary

In the Matter of	)	
	)	
MPS Media of Gainesville Licensee, LLP,	)	
Licensee of Station WNBW-DT,	)	File No. CSR-8692-N
Gainesville, Florida	)	
	)	MB Docket No. 12-214
For Waiver of §§ 76.92 and 76.106(a)	)	
of the Commission's Rules	)	

**OPPOSITION TO PETITION FOR SPECIAL RELIEF**

Orlando Hearst Television Inc., licensee of Station WESH(TV), Daytona Beach, Florida, ("WESH"), through counsel and pursuant to Rule 76.7 of the Commission's rules, respectfully files and serves its Opposition to the Petition for Special Relief filed by MPS Media of Gainesville Licensee, LLP, licensee of Station WNBW-DT ("WNBW"), seeking to obtain a waiver of the significantly viewed exception to the Commission's network non-duplication and syndicated exclusivity rules<sup>1</sup> with respect to WESH in the communities of Alachua, Gainesville, and Newberry, Florida, which are located in the Gainesville Designated Market Area ("DMA").

**INTRODUCTION**

The petition filed by WNBW (the "Petition") seeks to remove the significantly viewed status of WESH in three communities in the Gainesville DMA served by cable operator Cox Communications. The Commission should decline to grant WNBW the relief it requests. As discussed below, WNBW has failed to meet the procedural requirements applicable to the Petition. However, even if the Commission chooses to overlook the procedural error, WNBW cannot prevail on the merits as it has failed to provide evidence sufficient to demonstrate that

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<sup>1</sup> 47 C.F.R. §§ 76.92 and 76.106.

WESH is no longer significantly viewed in the communities of Alachua,<sup>2</sup> Gainesville, and Newberry, Florida.

## ARGUMENT

### **I. The Petition Should Be Dismissed For Failure To Properly Serve WESH.**

Commission rules require each Petition for Special Relief to be accompanied by a certificate of service.<sup>3</sup> Applicants for special relief are required to serve their petitions on any interested party who is likely to be directly affected if the requested relief is granted.<sup>4</sup>

There can be no question that Station WESH is an interested party within the meaning of Rule 76.7(a)(3). WESH should have been served with a copy of the Petition at its official address on file with the Commission.<sup>5</sup> Neither WESH nor its attorneys can find any record that the Petition was received at its official address or at the local station. Indeed, the certificate of service does not include WESH among the list of parties served, so it appears WESH was not served at all.

Counsel for WESH received notice and a copy of the Petition not from WNBW, as required by the FCC's rules, but first by seeing it on the Commission's public releases and then

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<sup>2</sup> Alachua is both the name of a county in the Gainesville DMA and the name of a city. See City of Alachua, <http://www.cityofalachua.com/> (last visited Aug. 14, 2012). References to Alachua herein refer to the city of Alachua.

<sup>3</sup> See 47 C.F.R. § 76.7(a)(3).

<sup>4</sup> See 47 C.F.R. § 76.7(a)(3); see also *RCN Corporation*, Order on Reconsideration, 25 FCC Rcd 5537, ¶ 6 (MB 2010) (granting petition for reconsideration following petition for special relief not served on interested party and noting that public notice was not sufficient to cure defect in service).

<sup>5</sup> See Station Search Details, available at [http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/sta\\_det.pl?Facility\\_id=25738](http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/sta_det.pl?Facility_id=25738) (last visited Aug. 15, 2012) (specifying official address on file with the Commission as c/o Brooks Pierce et al., P.O. Box 1800, Raleigh, NC 27602).

by obtaining a copy of the Petition online. However, WESH's own efforts to seek out a copy of the Petition do not correct the procedural defect. WESH has not had the full 20 days to respond, as permitted by Rule 76.7. WNBW's lack of service has prejudiced WESH due to the compressed response time. Accordingly, the Petition should be dismissed for its failure to serve WESH.

Moreover, WNBW also failed to notify WESH of its intention to purchase and have performed the significantly viewed study that is the basis of its Petition. Rule 76.54(c) requires notice of a significantly viewed study to be served on all licensees or permittees of television stations within whose predicted noise limited service contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least 30 days prior to purchasing the data.<sup>6</sup> While it appears that WESH's noise limited service contour does not cover the particular communities at issue (Alachua, Gainesville, and Newberry), certainly WESH is an interested party entitled to prior notice of the study. Had WESH been served with notice, it could have pointed out, as contemplated by Rule 76.54(c), the substantial defects in the proposed Nielsen study.

## **II. The Data Submitted By WNBW Are Defective And Fail To Satisfy The Commission's Rules Applicable To Significantly Viewed Studies.**

The data submitted by WNBW in support of its Petition are woefully inadequate to support its request for waiver. As discussed below, WNBW has provided a study performed by Nielsen that is defective in two fatal ways—first, the study presents Nielsen sweeps data from two periods in 2010 and two periods in 2011 in combined format, and, second, the system-

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<sup>6</sup> 47 C.F.R. § 76.54(c); *Saga Broadcasting, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 16851, DA 11-2032, ¶ 4 & n. 15 (MB 2011).

specific study fails to demonstrate that the sample includes diaries from each community served by the Cox system that are proportional to the population.

*KCST-TV* and subsequent Commission decisions require that petitioners for waiver of the significantly viewed exception must demonstrate for two consecutive years that a station no longer achieves the significant viewing threshold, based on either community-specific or system-specific over-the-air viewing data.<sup>7</sup> To do so, petitioners must submit Nielsen sweeps data from at least two sweeps periods in each of two consecutive years.<sup>8</sup> As explained in the Commission's recent case *WTVG, Inc.*, "[t]he criteria set forth in *KCST-TV* require that *two separate surveys* be performed pursuant to 76.54(b) in *consecutive years*. The provisions of Section 76.54(b) . . . apply to *each year's survey*."<sup>9</sup>

The data submitted by WNBW fail to meet the requirements of *KCST-TV* and applicable Commission precedent. The study provided by Nielsen and attached to the Petition presents July 2010, November 2010, May 2011, and November 2011 sweeps periods *combined in one study*. Yet, if it chose to use these sweeps periods, WNBW was required to show WESH viewing data for July 2010 and November 2010 combined in year one and May 2011 and November 2011 combined in year two—that is, instead of aggregating four sweeps periods as WNBW has done,

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<sup>7</sup> See, e.g., *Saga Broadcasting, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 16851, DA 11-2032, ¶ 3 (MB 2011); *WTVG, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 2665, DA 10-459, ¶ 3 (MB 2010); *KCST-TV, Inc.*, Memorandum Opinion and Order, 103 FCC 2d 407 (1986).

<sup>8</sup> See e.g., *Saga Broadcasting, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 16851, DA 11-2032 (presenting in each community studied data for March 2009/May 2009 in year one and February 2010/May 2010 in year two). Petitioners are permitted, but not required, to include more than two combined sweeps periods in each year studied, provided that the petitioner also submits separate sweeps data for each individual sweeps period used. See *id.*, ¶ 4.

<sup>9</sup> *WTVG, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 2665, DA 10-459, n.12 (MB 2010) (emphasis added).

it should have broken out the first two sweeps in one analysis and the second two sweeps in a separate analysis. WNBW has not submitted viewing data that complies with relevant Commission rules and precedent for two consecutive years, as required. WNBW's failure to do so is fatal to the Petition.

Even if this failure alone were not enough to merit denial of the Petition, WNBW has also failed to supply data sufficient to demonstrate compliance with the Commission's "proportionality" requirement. It appears that WNBW has submitted a system-specific rather than community-specific study with respect to WESH, as the zip codes presented in the Nielsen study are associated with three separate communities—Alachua, Gainesville, and Newberry, Florida—and each of these communities is served by the Cox cable system.<sup>10</sup>

It is well established that when a petitioner submits a system-specific significantly viewed study including data for two or more communities, as is the case here, the percentage of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.<sup>11</sup> The Commission routinely denies petitions for waiver of a station's significantly viewed status when the petitioner fails to provide data demonstrating that the study satisfies this "proportionality" requirement.<sup>12</sup>

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<sup>10</sup> See Petition, Significant Viewing Study and Petition Filed for "System of" tables. It is unclear whether this is a single Cox system or whether all communities within the single system have been included.

<sup>11</sup> See *WTVG, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 2665, DA 10-459, ¶ 4 (MB 2010).

<sup>12</sup> See e.g., *Virginia Broadcasting Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 3462, DA 06-761, ¶ 7 (MB 2006); *WGME Licensee, LLC*, Memorandum Opinion and Order, 21 FCC Rcd 13668, DA 06-2327, ¶ 8 (MB 2006) (denying petition in pertinent part due to lack of proportionality showing); *KGWN-TV*, 15 FCC Rcd 14752, DA 00-1777, ¶ 5 (CSB 2000) (also noting that zip codes in study were not identified with specific communities); *Benedek License Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 15597, DA 98-1651, ¶¶ 11, 14 (CSB 1998) (rejecting in pertinent part system-specific showing due to failure to include

For example, in *WGME Licensee, LLC*, WGME-TV, licensed to Portland, Maine (Portland-Auburn DMA), sought a waiver of the significantly viewed exception for WBZ-TV, licensed to the Boston, Massachusetts (Boston (Manchester) DMA).<sup>13</sup> WGME-TV submitted nine separate studies for each of nine integrated cable systems—three cable systems were single-community systems, whereas the other six systems included two or more communities.<sup>14</sup> The Commission granted the petition with respect to two of the single-community systems because WGME-TV had demonstrated WBZ-TV no longer achieved the significantly viewed threshold for each of two consecutive years.<sup>15</sup> However, with respect to the six multiple-community cable systems, the Commission rejected the studies and denied the petition. The Commission explained that under 76.54(b) of the Commission’s rules, “each community must be included in the sample and the total sample must include households from each community that are proportional to the population.”<sup>16</sup> While WGME-TV apparently provided data demonstrating the number of diaries studied in each community—more evidence to support proportionality than WBNW has provided here—the data submitted did not actually reflect proportionality to the

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proportionality showing); *see also Gulf-California Broadcast Co.*, Memorandum Opinion and Order, 23 FCC Rcd 7406, DA 08-1072, n.23 (MB (2008) (stating that where audience statistics for three separate zip code groupings were combined without a showing of proportionality, these statistics would not be acceptable), *recon. granted after data corrected in* 24 FCC Rcd 2738, DA 09-492 (MB 2009).

<sup>13</sup> *WGME Licensee, LLC*, Memorandum Opinion and Order, 21 FCC Rcd 13668, DA 06-2327 (MB 2006) (hereinafter, “*WGME Licensee*”).

<sup>14</sup> *See WGME Licensee*, 21 FCC Rcd 13668 at n.22 & ¶ 6.

<sup>15</sup> *See WGME Licensee*, 21 FCC Rcd 13668 at ¶ 7.

<sup>16</sup> *See WGME Licensee*, 21 FCC Rcd 13668 at ¶ 8.

population of the communities studied.<sup>17</sup> Accordingly, the Commission denied the petition with respect to these cable systems serving multiple communities.

Moreover, in *Virginia Broadcasting Corp.*, WVIR-TV, licensed to Charlottesville, Virginia (Charlottesville-Harrisonburg DMA), sought a waiver of the significantly viewed exception for WWBT, licensed to Richmond, Virginia (Richmond-Petersburg DMA), and WRC-TV, licensed to Washington, DC (Washington, DC (Hagerstown) DMA).<sup>18</sup> As in *WGME Licensee*, WVIR-TV submitted system-specific studies for five cable systems. The Commission again denied the petition because, although WVIR-TV provided information regarding the total number of diaries from the relevant zip codes in each community and the number of diaries from each zip code in each of the two years studied—again, more evidence to support proportionality than WNBW has provided in this case—the petitioner failed to provide information regarding the population and sample for each community.<sup>19</sup> Accordingly, the Commission could not determine whether “each community [was] properly represented in the sample.”<sup>20</sup>

WNBW has utterly failed to provide any evidence at all to assess whether its system-specific significantly viewed study for WESH complies with the applicable proportionality requirement. The Commission denied the petitions filed in *WGME Licensee, LLC* and *Virginia Broadcasting Corp.* for each petitioner’s failure to provide information required to make a determination about the proportionality of its study. The Commission should likewise deny WNBW’s Petition in this case.

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<sup>17</sup> See *id.*

<sup>18</sup> *Virginia Broadcasting Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 3462, DA 06-761 (MB 2006) (hereinafter, “*Virginia Broadcasting*”).

<sup>19</sup> See *Virginia Broadcasting*, 21 FCC Rcd 3462 at ¶ 8.

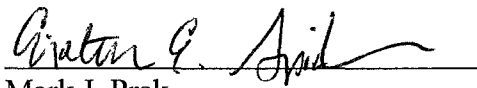
<sup>20</sup> See *Virginia Broadcasting*, 21 FCC Rcd 3462 at ¶ 8.



## CONCLUSION

For the foregoing reasons, WNBW's Petition should be denied.

ORLANDO HEARST TELEVISION INC.

A handwritten signature in dark ink, appearing to read "Mark J. Prak", written over a horizontal line.

Mark J. Prak  
Elizabeth Spainhour

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Its Attorneys

August 16, 2012

### Certificate of Service

The undersigned does hereby certify that I caused a copy of the foregoing **Opposition to Petition for Special Relief** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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Law Offices of Jack N. Goodman  
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Suite 800  
Washington, DC 20036

Division of Corporations Cable and/or  
Video Franchising  
P.O. Box 5678  
Tallahassee, FL 32314

General Manager  
WOGX  
4739 NW 52 Avenue #B  
Gainesville, FL 32653

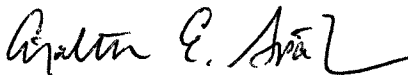
Dale Tapley  
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Gainesville, FL 32653

General Manager  
WTLV  
1070 East Adams Street  
Jacksonville, FL 32202

This the 16<sup>th</sup> day of August, 2012.

  
Elizabeth Spainhour

**Before the  
Federal Communications Commission  
Washington, D.C. 20544**

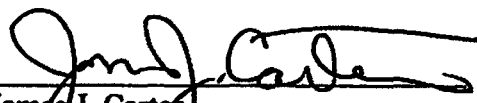
In the Matter of	)	
	)	
MPS Media of Gainesville Licensee, LLP,	)	
Licensee of Station WNBW-DT,	)	File No. CSR-8692-N
Gainesville, Florida	)	
	)	
For Waiver of §§ 76.92 and 76.106(a)	)	
of the Commission's Rules	)	

**Declaration of James J. Carter**

I, James J. Carter, hereby declare:

1. I am greater than 18 years of age and competent to make this Declaration.
2. I am President and the General Manager of television station WESH(TV), Daytona Beach, Florida.
3. The factual matters contained in the foregoing Opposition to Petition for Special Relief are true and correct to the best of my information, knowledge, and belief.
4. I declare under penalty of perjury that the foregoing is true and correct.

August 15, 2012  
Date

  
James J. Carter